Supreme Court, U. S.
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80-459

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

W. EARL DUNCAN, JAMES R. DUNCAN, HOYT P. PIVER, and DARIS H. PIVER, Administratrix of the Estate of AVERY A. PIVER, Deceased,

Petitioners,

v.

GLENN PENINGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

1. Whether a suit for damages is authorized against an employee of the Federal government in his individual capacity when said employee acts outside the scope of his authority, in bad faith and unreasonable; and the actions amount to a taking of petitioners' property in violation of Title 15 U.S.C. Section 634(b), and a taking of private property without due process of law and without just compensation pursuant to the Fifth Amendment of the Constitution of the United States.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION AND STATUTES 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 9

Introduction 9

Plaintiffs' Contentions 12

1. Defendant Peninger is not immune from this suit 12

2. The defendant was the SBA Administrator's representative with apparent broad authority 15

3. The defendant acted beyond the scope of his authority as a government agent as conceded by the government in its Answer to the suit pending in the United States Court of Claims 17

4. This action is not barred by the doctrine of Res Judicata or Collateral Estoppel 18

5. The Complaint states a claim upon which relief can be granted 21

CONCLUSION 21

TABLE OF AUTHORITIES

Cases: *Page*

Barr v. Matteo, 360 U.S. 654, 3 L. Ed. 2d 1434, 79 S. Ct. 1335 (1959) 12

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971) 15

Butz v. Economou, 438 U.S. 478, 57 L. Ed. 2d 895, 98 S. Ct. ____ 8, 9, 12-14, 15

Clark v. Volpe, 481 F.2d 634 (4th Cir. 1973) 10

Commissioner of Internal Revenue Service v. Sunnen, 333 U.S. 591 (1948) 21

Dann v. Studebaker-Packard Corp., 288 F.2d 201 (6th Cir. 1961) 12

Dore v. Kleppe, 522 F.2d 1369 (5th Cir. 1975) 21

Duncan v. Furrow Auction Co., 564 F.2d 1107 (4th Cir. 1977, *cert. den.*, 436 U.S. 904 (1978) 4, 7-8

Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947) 10

Howard-Bobbit Co. v. Never Fail Land Co., 191 N.C. 323, 131 S.E. 643 (1926) 17

Johns-Hopkins University v. Hutton, 297 F. Supp. 1165 (D. Md. 1968) 10

Johns-Hopkins University v. Hutton, 422 F.2d 1124 (4th Cir. 1970) 10-11

Pierce v. Ford Motor Co., 190 F.2d 1359 (4th Cir. 1975) 11

Salmon v. Parke, Davis and Company, 520 F.2d 1359 (4th Cir. 1975) 11

Scheuer v. Rhodes, 416 U.S. 232, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974) 9-10, 12, 15

Statutes:

15 U.S.C. Section 634(b)(2) . . . . . *i*, 3, 4, 6-7, 8, 15-16

Section 25-3-603(2), General Statutes of North Carolina 3

Page

Constitutional Provision:

Fifth Amendment of the Constitution of the United States . . . . . *i*, 2, 4, 6

Other Authority:

46 Am. Jur. 2d, Judgments Section 420 21

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No.

W. EARL DUNCAN, JAMES R. DUNCAN, HOYT P. PIVER, and DARIS H. PIVER, Administratrix of the Estate of AVERY A. PIVER, Deceased,

Petitioners,

v.

GLENN PENINGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on June 24, 1980.

OPINIONS BELOW

The opinion (order) of the United States District Court for the Western District of North Carolina dated August 13, 1979 is unreported and is reprinted in Appendix B hereto.

The opinion of the United States Court of Appeals for the Fourth Circuit is not yet reported and is reprinted in Appendix A hereto.

JURISDICTION

The judgment in this case of the United States Court of Appeals for the Fourth Circuit was filed on June 24, 1980.

This Court's jurisdiction in the present case is founded upon 28 U.S.C. Section 1254(1) which gives this Court authority to review, by writ of certiorari, the judgment of a United States Court of Appeals in a civil case.

CONSTITUTIONAL PROVISION AND STATUTES

Fifth Amendment to the Constitution of the United States

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 15, U.S.C. Section 634(b)(1) and (2)

Title 15, U.S.C. Section 634(b)(1) and (2) deal with the powers of the Administrator of the Small Business Administration, and in pertinent parts read as follows:

> (b) in the performance of, and with respect to, the functions, powers and duties vested in him by this Act the Administrator may—
>
> > (1) sue and be sued in any court of record of a State having general jurisdiction, or in any United States District Court, . . . but no . . . injunction . . . or other similar process, mense or final, shall be issued against the Administrator or his property.
> >
> > (2) Under regulations prescribed by him, assign or sell at public or private sale, or otherwise dispose of for cash or credit, in his discretion and upon such terms and conditions and for such consideration as the Administrator shall determine to be reasonable any evidence of debt, contract, claim, personal property or security assigned to or held by him in connection with the payment of loans granted under this Act. . . .

General Statutes of North Carolina, Section 25-3-603(2)

> (2) Payment or satisfaction may be made with the consent of the holder by any person including a stranger to the instrument. Surrender of the instrument to such a person gives him the rights of a transferee.

STATEMENT OF THE CASE

This case is the second appeal from the actions of the defendant in handling of a foreclosure for the Small Business Administration. The previous decision affirming a dismissal by the United States District Court for the Eastern District of North Carolina of a temporary restraining Order against the defendant Glenn Peninger is reported as *Duncan, et al. v. Furrow Auction Co.*, 564 F.2d 1107 (4th Cir. 1977), *cert. denied,* 436 U.S. 904 (1978). The instant case is an appeal from an order entered by the Honorable James B. McMillan, United States District Judge, on August 13, 1979 granting defendant's Motion to Dismiss, and dismissing the case for reasons set forth by the Fourth Circuit Court of Appeals in the prior decision. The order is not reported and appears in Appendix B.

This case was commenced as an action against defendant Glenn Peninger for $300,000.00 actual damages resulting from violations of the Fifth Amendment to the Constitution and for violations of 15 U.S.C. Section 634(b)(2) stemming from the handling of a foreclosure sale for the Small Business Administration, and for inducing one Richard Wallace to cause damages by his handling of a foreclosure sale at the same time for Advancement, Inc.

The Complaint alleged in substance that: (1) the plaintiffs were the holder of 80 per cent, *i.e.*, 4/5th, of the capital stock of Auto Vac Company, Inc., (2) that Advancement, Inc. and the Small Business Administration were in the process of selling certain assets of Auto Vac Company, Inc. pursuant to two (2) Notices of Public Foreclosure Sales (these Notices are attached to

the Complaint—Exhibit "A" is the Notice in favor of the Small Business Administration and Exhibit "B" is the Notice in favor of Advancement, Inc.), (3) that the defendant Glenn Peninger was the agent or employee of the Small Business Administration supervising the sale, (4) that the defendant Glenn Peninger was an agent or employee of the Small Business Administration of the United States government, and was acting as a federal agent under color of federal law and authority, (5) that on January 28, 1976 the plaintiffs entered into an express oral agreement with Glenn Peninger on behalf of the Small Business Administration, and with Richard Wallace on behalf of Advancement, Inc., that the plaintiffs would tender cashier's checks in the amount of $60,409.07 to the Small Business Administration and in the amount of $44,579.40 to Advancement, Inc. In exchange for the cashier's checks the Small Business Administration, acting through Glenn Peninger, and Advancement, Inc., acting through Richard Wallace, agreed to assign to Columbus Developers, Inc., a corporation wholly owned by the plaintiffs, the Promissory Notes, Security Agreements and the respective collateral interests held by each, (6) that the plaintiffs prior to sale time owned 100 per cent of the capital stock of Columbus Developers, Inc., which corporation caused the following cashier's checks to be issued by Southern National Bank and tendered to the defendants in full payment of and in exchange for an assignment of the respective notes, deeds of trust and/or collateral:

Date	*Number*	*Payee*	*Am unt*
1/29/76	30736	Small Business Administration	$60,409.07
1/29/76	30739	Advancement, Inc.	22,289.70
1/29/76	30740	Advancement, Inc.	22,289.70

(7) that the defendant Glenn Peninger failed and refused to perform said agreement in that he refused to accept the cashier's check payable to the Small Business Administration and induced Advancement, Inc. to fail and refuse to perform said agreement in that Advancement, Inc., acting through Richard Wallace, refused to accept the cashier's checks payable to it. The Promissory Note, Security Agreement and/or collateral interest owned both by the Small Business Administration and by Advancement, Inc. were not assigned to Columbus Developers, Inc., (8) that the plaintiffs on their part performed all of the terms and conditions of the oral agreement to be performed by them, (9) that the foreclosure sales netted approximately $48,000.00 total and, that the breach of the oral agreement by the defendant Glenn Peninger, and the defendant Glenn Peninger's inducement of Richard Wallace to breach the oral agreement effectively put Auto Vac Company, Inc. out of business, damaging it in the amount of $300,000.00, and (10) that the acts of the defendant Glenn Peninger set forth above, together with the actual conduct of the foreclosure sale supervised by the said defendant wherein the property of Auto Vac Company, Inc. was first sold in a lump sum and then second by individual item; instead of in the usual order of individual item first and total lump sum second, amounted to a deprivation of plaintiffs' property without due process of law and a taking of private property for public use without just compensation in violation of the Fifth Amendment to the Constitution of the United States. Moreover, the acts aforesaid were specifically in violation of the requirement of 15 U.S.C. 634(b)(2) which requires the Administrator of the Small Business Administration and

his agents to act reasonably in the handling of any loan including the assignment or sale of any personal property or security held by him in connection with said loans.

The defendant filed an extensive Motion to Dismiss or In the Alternative for Summary Judgment and Supplement and attachment asking for dismissal because: (1) defendant Peninger was immune from plaintiffs' suit for damages because the actions of said defendant were taken within the scope of his employment as a federal employee, (2) that while acting as a federal employee, the defendant was acting as the agent of the SBA Administrator, which Administrator has wide discretion to administer loans; however, the authority of the defendant was extremely limited, (3) that the action is barred by the doctrine of *Res Judicata,* (4) that the action is barred by the doctrine of Collateral Estoppel, and (5) that the Complaint fails to state a claim upon which relief can be granted.

Plaintiff opposed the Motion to Dismiss and the Motion for Summary Judgment on the grounds: (A) that the defendant is not immune from this suit for damages, (B) that the defendant was the SBA Administrator's representative with apparent broad authority, (C) that the defendant acted beyond the scope of his authority as conceded by the government in its Answer to the suit pending in the United States Court of Claims entitled *Duncan, et al. v. United States,* No. 37-79, (D) that the action is not barred by the doctrine of *Res Judicata* or *Collateral Estoppel,* and (E) that the Complaint does state a claim upon which relief can be granted.

The trial judge, relying upon dictum in the prior case of *Duncan, et al. v. Furrow Auction Co.,* 564 F.2d 1107

(4th Cir. 1977), apparently dismissed this case by the finding of the Fourth Circuit (made without benefit of the Government's Answer in the Court of Claims case set forth above stating that the defendant acted beyond the scope of his authority, and made before the decision in *Butz v. Economou*, 438 U.S. 478, 57 L. Ed. 2d 895, 98 S. Ct. ____ (1978), upon which plaintiffs rely) to the effect that . . . "nothing required the Administrator to accept plaintiffs' offer to purchase the notes rather than proceed with the foreclosure. Nothing indicates that this was unreasonable . . . there is nothing to show that the Administrator acted unreasonably". This is total dictum in that the holding of the prior Fourth Circuit case was that 15 U.S.C. Section 634(b)(1) prohibits an injunction which was all the relief requested by the plaintiffs in that case.

The Fourth Circuit in that case at bar affirmed the lower court's decision (*see* opinion in Appendix A) upon the grounds:

1. That Peninger had no authority to make the alleged contract on behalf of the Administrator of the Small Business Administration.

2. Therefore, there was no question of reasonableness of the refusal by the Small Business Administration to sell to plaintiffs.

3. That 15 U.S.C. Section 634(b)(2) does not extend to authorize a cause of action against a Small Business Administration employee in his individual capacity.

4. That Advancement, Inc. could have refused to honor its alleged contract with the plaintiffs for any number of reasons, not the least a belief, not induced by defendant or any other party, that, in view of the

Small Business Administration's position, its asserted contract with the plaintiffs was invalid.

5. That plaintiffs lack standing to raise any constitutional claim concerning the actual conduct of the auction and

6. That Peninger had made no representation that he had authority to enter into the contract on behalf of the Small Business Administration and, therefore, there is no foundation for a claim of an asserted breach of warranty.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The courts below have decided an important question in the administration of the loan provisions supervised by the Small Business Administration of the federal government which has not been, but should be, settled by this Court. The Small Business Administration has numerous contacts with small businessmen, and makes numerous loans to small businessmen and has done such since it has been in existence. The public, and especially these small businessmen, place exceptional importance on knowing how to properly deal with federal government officials and in knowing the extent of actions of government officials that will be condoned by the courts.

Petitioners contend that the lower courts' decisions are in conflict with the principle of, *i.e.*, the spirit of, if not the letter of, this Court's decision in *Butz v. Economou*, 438 U.S. 478, 57 L. Ed. 2d 895, 98 S. Ct. ____ and *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct.

1683, 40 L. Ed. 2d 90 (1974), authorizing suits, individually, against government employees who act outside the scope of their authority.

Petitioners moreover contend that the time has come to reexamine this Court's decision in *Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380 (1947), for the reasons set forth in the dissenting opinion of that case. It is absurd that the petitioners are held to have to determine the extent of authority of a field agent, supervising an auction sale for the Small Business Administration, within the confines of the Federal Register, because the power to sell must necessarily include any lesser power which would not result in a sale, *i.e.*, the power to sell is the greatest power that a federal agent could possess under the facts of this case.

The District Court purported to dismiss this case under Rule 12(b)(6) F.R.C.P. for failure to state a claim upon which relief can be granted even though it considered matters outside of the pleadings, and appropriately should have addressed itself to the alternative Motion for Summary Judgment under Rule 56 F.R.C.P.; *compare Clark v. Volpe,* 481 F.2d 634 (4th Cir. 1973). This makes no problem in that the tests under each rule are significantly similar under each rule.

The District Court's function on a Motion for Summary Judgment is to determine if there is a genuine dispute of a material fact, and is not to resolve factual disputes, *Johns Hopkins University v. Hutton,* 297 F. Supp. 1165 (D. Md., 1968), *affirmed in part and reversed in part on other grounds,* 422 F.2d 1124 (4th Cir. 1970). Moreover, on summary judgment inferences arising from the evidence must be viewed in the light

most favorable to the party opposing the motion. *Johns Hopkins University v. Hutton,* 422 F.2d 1124, 1131 (4th Cir. 1970), and *Salmon v. Parke, Davis and Company,* 520 F.2d 1359 (4th Cir. 1975).

The *Salmon* case contains the following language (at page 6 of the Slip Opinion):

> . . . The critical question is whether a genuine issue exists as to the inferences or conclusions that may properly be drawn from the evidence. *American Fidelity and Casualty Co. v. London and Edinbury Insurance Co.,* 354 F.2d 214, 216 (4th Cir. 1965); *Pierce v. Ford Motor Co.,* 190 F.2d 910, 915 (4th Cir. 1951). The inferences must be viewed in the light most favorable to the [party opposing summary judgment], *and the [summary] judgment must be reversed if "inferences contrary to those drawn by the trial court might be permissible." United States v. Diebold,* 369 U.S. 654 (1962) [emphasis supplied].

In the Fourth Circuit the following observation has been made by the Court of Appeals in *Pierce v. Ford Motor Co.,* 190 F.2d 910, 915 (4th Cir. 1951):

> . . . It is only where it is perfectly clear that there are no issues in the case that a summary judgment is proper. Even in cases where the judge is of opinion that he will have a verdict for one party or the other on the issues that have been raised, he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment, which was never intended to enable parties to evade jury trials or have the judge weigh evidence in advance of its being presented.

Likewise, the test to be applied by the District Judge in ruling upon a Motion to Dismiss for failure to state a claim upon which relief can be granted is that it appears to certainty that no set of facts could be proven at trial which would entitle plaintiff to any relief, *Dann v. Studebaker-Packard Corp.*, 288 F.2d 201 (6th Cir. 1961). Moreover, the allegation of the Complaint should be construed favorably to pleader, *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974).

PLAINTIFFS' CONTENTIONS

1. Defendant Peninger is not immune from this suit.

The defendant's main contention is that he is absolutely immune from suit for damages, being a public official acting in his capacity and in pursuit of his official duties. The defendant says furthermore that the plaintiffs, if they are entitled to damages at all, are entitled to damages only against the United States in the case now pending in the United States Court of Claims. The defendant relies on *Barr v. Matteo*, 360 U.S. 654 (1959). The defendant ignores the holding of *Butz v. Economou*, 438 U.S. 478, 57 L. Ed. 2d 895, 98 S. Ct. ____ (1978), which limits or reverses for all practical purposes the *Barr* doctrine.

The following language explains the rationale of *Butz v. Economou* from Part 11 of the opinion [at page 902 and 903 of 57 L. Ed. 2d and at pages 6 and 7 of the Slip Opinion]:

> The single submission by the United States on behalf of petitioners is that all of the federal officials sued

in this case are absolutely immune from any liability for damages even if in the course of enforcing the relevant statutes they infringed respondent's constitutional rights and even if the violation was knowing and deliverate. Although the position is earnestly and ably presented by the United States, we are quite sure that it is unsound and consequently reject it.

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), the victim of an arrest and search claimed to be violative of the Fourth Amendment brought suit for damages against the responsible federal agents. Repeating the declaration in *Marbury v. Madison,* 1 Cranch 137, 163 (1803), that "the very essence of civil Liberty certainly consists in the right of every individual to claim the protection of the laws." 403 U.S., at 397, and stating that "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty," *id.,* 395, we rejected the claim that the plaintiff's remedy lay only in the state court under state law, with the Fourth Amendment operating merely to nullify a defense of federal authorization. We held that a violation of the Fourth Amendment by federal agents gives rise to a cause of action for damages consequent upon the unconstitutional conduct. *Ibid.*

Bivens established that compensable injury to a constitutionally protected interest could be vindicated by a suit for damages invoking the general federal question jurisdiction of the federal courts, but we reserved the question whether the agents involved were "immune from liability by virtue of their official position," and remanded the case for that determination. On remand, the Court of

> Appeals for the Second Circuit, as has every other court of appeals that has faced the question,[9] held that the agents were not absolutely immune and that the public interest would be sufficiently protected by according the agents and their superiors a qualified immunity.
>
> In our view, the courts of appeals have reached sound results. We cannot agree with the United States that our prior cases are to the contrary and support the rule it now urges us to embrace. Indeed, as we see it, the Government's submission is contrary to the course of decision in this Court from the very early days of the Republic.

The cases referred to in footnote 9 of the *Butz* case are the following:

> *Black v. United States,* 534 F.2d 524 (C.A. 2, 1976); *State Marine Lines v. Shultz,* 498 F.2d 1146 (C.A. 4, 1974); *Mark v. Groff,* 521 F.2d 1376 (C.A. 9, 1975); *GM Leasing Corp. v. United States,* 560 F.2d 1011 (C.A. 10, 1977); *Apton v. Wilson,* 165 U.S. App. D.C. 22, 506 F.2d 83 (1974); *see Paton v. LaPrade,* 524 F.2d 862 (C.A. 3, 1975); *Weir v. Muller,* 527 F.2d 872 (C.A. 5, 1977); *Brubaker v. King,* 505 F.2d 534 (C.A. 7, 1974); *Jones v. United States,* 536 F.2d 269 (C.A. 8, 1976).

Neither is the defendant one of the group of officials protected in *Butz v. Economou,* 438 U.S. 478 (1978) (in this regard see the affidavits of defendant as well as his boss, John R. Dorrier, attached to defendant's Motion). Plaintiffs' complaint sets forth the facts that defendant Peninger unreasonably refused to honor his oral agreement to assign the note and assign the security agreement held by the SBA to plaintiffs' wholly owned

corporation while the defendant acted under the guise of a federal employee.

The government in the Court of Claims filed its Answer on June 11, 1979 (a copy of which is attached to Plaintiff's Memorandum in Opposition as Exhibit "B") wherein on page 4 the Third Affirmative Defense to substantially similar allegations appears as follows:

"Third Affirmative Defense

19. Mr. Glenn Peninger, an employee of the defendant, lacked authority to bind the Government in the manner, and to the extent, alleged by plaintiffs."

Therefore, it must be concluded, construing the inferences in plaintiffs' favor, that if the defendant Glenn Peninger lacked authority to enter into any such oral agreement on behalf of the government, and if the defendant did, in fact, enter into such oral agreement, and if defendant later reneged on such oral agreement, the plaintiffs unreasonably lost their property in violation of Constitutional mandates, and the defendant is not immune from this suit, *Butz v. Economou,* 438 U.S. 478 (1978), and cases cited therein, including *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), and *compare Scheuer v. Rhodes,* 416 U.S. 232 (1974), cited therein.

2. The defendant was the SBA Administrator's representative with apparent broad authority.

The authority of the Administrator of the SBA is set forth in detail in 15 U.S.C. Sec. 634(b)(2), which reads as follows:

(b) *Powers of Administrator.* In the performance of, and with respect to, the functions, powers, and duties vested in him by this Act [15 U.S.C. Sec. 631 *et seq.*] the Administrator may—

(2) under regulations prescribed by him, *assign or sell at public or private sale,* or otherwise dispose of for cash or credit, in his discretion and *upon such terms and conditions* and for such consideration *as the Administrator shall determine to be reasonable, any evidence of debt,* contract, claim, *personal property, or security assigned to or held by him in connection with the payment of loans granted under this Act* [15 U.S.C. Sec. 631 *et seq.*] and to collect or compromise all obligations assigned to or held by him and all legal or equitable rights accruing to him in connection with the payment of such loans until such time as such obligations may be referred to the Attorney General for suit or collection [emphasis supplied].

Thus, the Administrator had wide discretion to act reasonably in either selling or assigning any evidence of debt, personal property or security assigned to him in connection with the payment of loans, granted under the Act. Glenn Peninger was the administrator's representative on the premises in Chadbourn, North Carolina, both the day of the sale (defendant admits in his Answer that he supervised the sale for the SBA) and the day prior. It is plaintiffs' contention that if he had the power to supervise the sale, which power would be the most final and highest power as far as the plaintiffs were concerned (because the exercise of such power deprived the plaintiffs of their property), then he had the lesser included power to assign the promissory note

and security agreement to the plaintiffs' wholly owned corporation. Moreover, acting as the Administrator's representative, he had the apparent authority to enter into an assignment of the promissory note and security agreement, *compare Howard-Bobbit Co. v. Never Fail Land Company*, 191 N.C. 323, 131 S.E. 643 (1926).

3. The defendant acted beyond the scope of his authority as a government agent as conceded by the government in its Answer to the suit pending in the United States Court of Claims.

See the discussion of this item under part 1 *ante*. Assuming *arguendo* that the defendant did not have the authority to bind the Government in the manner, and to the extent alleged by the plaintiffs in the Court of Claims case (which allegations are substantially identical to the allegations in this Court), then the questions are whether or not the defendant acted reasonably under the circumstances involved, and whether or not the defendant is liable for damages sustained by the plaintiffs. The government and this defendant cannot have their cake and eat it too. Defendant Peninger was either acting within the discretion of the SBA Administrator and acting reasonably (as found by the Fourth Circuit in the related injunction case discussed below, the Fourth Circuit did not have the benefit of the government's Answer now filed in the Court of Claims case), or the defendant was acting beyond the scope of his authority, acting unreasonably, and such action subjects defendant Peninger to the plaintiffs' claim for damages in the instant case.

4. This action is not barred by the doctrine of Res Judicata or Collateral Estoppel.

The defendant Peninger has made much ado about the prior injunction litigation which originated in the Superior Court of Columbus County, North Carolina on January 29, 1976 seeking a temporary restraining order, preliminary and final injunctions restraining two (2) foreclosure sales of the assets of Auto Vac Company, Inc. against the auctioneer (Furrow Auction Company), a note holder (Advancement, Inc.) and Glenn Penninger (the agent or employee of the other note holder Small Business Administration). *The important fact to remember is that at the time of filing the Complaint in the State Court the assets of Auto Vac were not distributed and, therefore, no damages had been incurred. The damages, in fact, did not occur until the federal court after removal of the case overturned the temporary restraining order on February 27, 1976 and dismissed the case against Glenn Peninger which act, in fact, precipitated the damages now being sued for in the instant case. The other important operative fact is that the plaintiffs were not allowed to file an Amended Complaint against the defendants for damages incurred.*

The operative facts of the injunction litigation were as follows:

A. Case commenced on January 29, 1976 to restrain the foreclosure sales for which damages are now sought in the instant case.

B. Upon posting of a $30,000.00 bond the State Court issued its Order restraining defendants (including Peninger) and all persons in active concert and participation with them from transferring, selling, delivering

and disposing of any of the personal property of Auto Vac Company, Inc. whether at auction or otherwise pending a hearing to be held on February 5, 1976.

C. However, on February 2, 1976 the defendant Glenn Peninger filed a Petition for Removal to the Wilmington, North Carolina federal court stating that at the time and place of the occurrences giving rise to the allegations of the Complaint, he was an employee of the Small Business Administration, serving in his official capacity, and was acting under color of his office, status, right, title and authority under the United States laws affecting Small Business Administration.

D. On February 5, 1976 the Small Business Administration moved to intervene and filed its Answer alleging in substance that the cashier's check for $60,409.07 was tendered to the Small Business Administration approximately five minutes prior to the sale by the plaintiffs for an assignment of the Deed of Trust, admitting that it refused to accept the check described in the Complaint, and defending upon the ground of sovereign immunity under 15 U.S.C. Sec. 634(b)(1).

E. The District Judge signed an Order dated February 3, 1976 authorizing the United States Marshal to seize all of the undelivered personal property belonging to Auto Vac Company, Inc. still located on the premises where the auctions had been held on January 29, 1976, and in effect returning those items to the control of the Small Business Administration.

F. Finally on February 17, 1976, a hearing was held on the Small Business Administration's Motion to Dismiss and Motion to Vacate Temporary Restraining Order, and on plaintiffs' Motion for Preliminary Injunction.

G. In support of plaintiffs' Motion a detailed Affidavit was filed signed by one of the plaintiffs W. Earl Duncan. The Small Business Administration failed to file any affidavit, and no testimony from any witness was taken at the hearing before the District Judge. Mr. Duncan's affidavit stated that the plaintiffs intended to file an Amended Complaint against the defendants to require the setting aside of the foreclosure sale and for damages.

H. The Honorable F. T. Dupree, Jr., United States District Judge, on February 27, 1976 entered an Order dissolving plaintiffs' temporary restraining order, denying plaintiffs' Motion for a Preliminary Injunction, dismissing plaintiffs' Complaint as to defendant Glenn Penninger and intervenor Small Business Administration and remanding said action to the Superior Court for Columbus County, North Carolina.

Plaintiffs also requested a stay of the trial court's order dissolving the temporary restraining order; the order denying that relief is dated March 10, 1976.

I. The plaintiffs appealed to the Fourth Circuit. The Fourth Circuit, without the benefit of the Answer now filed by the Government in the Court of Claims case (attached hereto as Exhibit "B"), upheld the District Judge finding that Peninger was "the agent, servant, and/or employee of the SBA supervising the sale," acting within the scope of his authority for the Administrator of the SBA and "that nothing required the Administrator to accept plaintiffs' offer to purchase the notes rather than to proceed with the foreclosure," and "Nothing indicates that this was unreasonable."

Before the plaintiffs' cause of action in the instant case could be barred by the doctinre of Res Judicata or

Collateral Estoppel, there must have been the opportunity to litigate the issue in the prior proceeding. Plaintiffs were given no such opportunity in the injunction litigation because the damages had not occurred at the time the temporary restraining order was issued, and because the plaintiffs were afforded no opportunity to file an Amended Complaint for damages, *Dore v. Kleppe,* 522 F.2d 1369, 1374 (5th Cir. 1975); *Commissioner of Internal Revenue v. Sunnen,* 333 U.S. 591 (1948); 46 Am. Jur. 2d, Judgments Sec. 420.

5. The Complaint states a claim upon which relief can be granted.

In conclusion, for the reasons stated above, the Complaint states a cause of action against the defendant Glenn Peninger, and the defendant Glenn Peninger is not entitled to a summary judgment as a matter of law or to dismissal of the Complaint.

CONCLUSION

For the reasons stated this Court should grant the petition for certiorari and hear the issues raised in this important area of dealing with federal government officials.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1609

[Published]

W. EARL DUNCAN, JAMES R. DUNCAN, HOYT P. PIVER, DARIS H. PIVER, Administratrix of the Estate of Avery A. Piver, Deceased,

Appellants,

v.

GLENN PENINGER,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE. JAMES B. McMILLAN, DISTRICT JUDGE.

Argued May 9, 1980 Decided June 24, 1980

Before WINTER, WIDENER and MURNAGHAN, Circuit Judges.

Ralph G. Jorgensen for Appellants; Wayne C. Alexander, Assistant United States Attorney (Harold M. Edwards, United States Attorney; Pamela G. Steele, Small Business Administration on brief) for Appellee.

MURNAGHAN, Circuit Judge:

Posed by this case is the question of whether a sufficient claim was asserted where a Small Business Administration official was claimed to have caused the breach of an oral agreement by the SBA to sell instruments of indebtedness owned by the SBA. We hold that no viable claim existed and affirm the district court's judgment in favor of the defendants.

I.

In 1969 Auto Vac Comany, Inc. borrowed $85,000 from a bank, evidencing the indebtedness by a note. The debt was secured by much of the company's personal property and by the personal guaranty of the company's president, Joseph Lane, and of his wife. The personal guaranty was itself secured by two deeds of trust on real property comprising the Lanes' personal residence and a family farm. Ninety percent of the indebtedness to the bank was also guaranteed by the SBA. The plaintiffs in the instant suit (who own 80% of Auto Vac's stock) were not yet shareholders; consequently, they executed no documents in connection with the SBA-guaranteed loan.

By 1971, the company had defaulted on some of its obligations under the loan, and, at the bank's request, the SBA purchased its guaranteed portion of the loan. The note and all supporting instruments were assigned by the bank to the SBA for servicing, with the bank retaining its 10% interest.

After the note matured in 1975, without full payment of the principal, the SBA called it, and a public auction was scheduled for January 29, 1976. The auction was to be coordinated with a similar public sale by Advancement, Inc., another creditor of Auto Vac, which held

liens on some items. The original amount of the debt to Advancement was $45,000. The defendant, Glenn Peninger, was an SBA employee (Loan Specialist, Portfolio Management) who managed the liquidation of the SBA-guaranteed loan to Auto Vac. He attended the public sale, which was conducted by the Furrow Auction Company.

According to the complaint, on January 28, 1976, plaintiffs agreed to an oral contract with the SBA (acting through its agent Peninger) and Advancement (by its agent Richard Wallace).[1] The alleged contract called for the notes, security agreements, and collateral interests under the loans to be assigned by the creditors to another corporation, Columbus Developers, Inc., owned by plaintiffs. In return, the SBA allegedly would receive a cashier's check for $60,409.07, and Advancement would receive a similar check for $44,579.40.

It was also asserted that on January 28, the Lanes agreed with Peninger to cover any deficiency on the SBA claim remaining after the proceeds of the public sale had been applied to the indebtedness, and they promptly placed sufficient funds in escrow with their attorney.

On January 29, 1976, five minutes before the scheduled 11:00 a.m. beginning of the auction, plaintiffs tendered their cashier's checks to Peninger, but he refused to accept them. The foreclosure sale of the collateral proceeded and yielded approximately $48,000. Subsequent to the auction, the Lanes paid the remaining indebtedness, making the SBA whole and freeing their home and farm from the SBA's security interest.

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[1]Advancement has not been sued in the present case; the action is solely against Peninger.

An earlier suit than the present one instantly followed, in which the plaintiffs sought, *inter alia*, a restraining order against the completion of the sales. The trial court denied relief in view of 15 U.S.C. § 634(b)(1) (1976), which forbids "attachment, injunction, garnishment, or similar process . . . against the Administrator or his property," and we affirmed. *Duncan v. Furrow Auction Co.*, 564 F.2d 1107 (4th Cir. 1977), *cert. denied*, 436 U.S. 904 (1978).

Then on January 26, 1979, shortly prior to expiration of the applicable statute of limitations, plaintiffs filed two suits seeking damages for harm allegedly suffered as a result of the SBA's refusal to sell them the notes and security agreements. One is the present case in which the defendant is Peninger. The other, in the Court of Claims, is against the United States.

Reading the complaint in the instant case liberally, plaintiffs have alleged four distinct causes of action:

1. A violation of 15 U.S.C. § 634(b)(2) (1976) because the refusal to sell to them was unreasonable under the circumstances;

2. Improper inducement of Advancement to break its contract with plaintiffs;

3. A taking of property without adequate compensation in violation of the United States Constitution; and

4. A breach by Peninger of his asserted warranty of authority that he had the capacity to act for and bind the SBA.

Defendant moved for dismissal or, in the alternative, for summary judgment. The district court dismissed plaintiffs' complaint "for the reasons set forth by the

Fourth Circuit Court of Appeals in *Duncan, et al. v. Furrow Auction Co.*, 564 F.2d 1107 (1977)." Plaintiffs' route is difficult. Even if the suit is against Peninger solely in his individual capacity, 28 U.S.C. § 1500[2] may well oust the Court of Claims of jurisdiction of the companion suit, for the allegations make clear that Peninger was regarded throughout by the plaintiffs as acting for the Government, not on his private behalf. The complaint asserts that the "defendant Glenn Penninger [*sic*] *acting for the Small Business Administration* failed and refused to perform said agreement . . . . Moreover, said defendant Glenn Peninger, *acting for the Small Business Administration* induced Advancement, Inc. to fail and refuse to perform said agreement . . ." (emphasis supplied).[3]

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[2] 28 U.S.C. § 1500 (1976) provides:

> The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

[3] It seems highly probable that Peninger, even though recovery is sought from him individually, is, therefore, alleged to have been "acting or professing to act . . . under the authority of the United States." However, it is not part of our task, and we expressly refrain from addressing the effect of the instant case on the companion suit in the Court of Claims. *Cf. British Am. Tobacco Co. v. United States*, 89 Ct. Cl. 438 (1939), *cert. denied*, 310 U.S. 627 (1940). *See generally*, Schwartz, *Section 1500 of the Judicial Code & Duplicate Suits Against the Government & Its Agents*, 55 Geo. L. J. 573 (1967).

II.

A. Unreasonableness.

In all events, any claim asserted by the plaintiffs against the federal government is manifestly groundless. In *Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380 (1947), a farmer had entered a contract with an agent of the federal corporation in which the corporation undertook to insure 400 acres of reseeded spring wheat. Without the actual knowledge of either the farmer or the agent of the federal corporation, a regulation had been promulgated which prohibited insurance of reseeded spring wheat. The Supreme Court denied recovery on the purported contract stating: "Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents. 49 Stat. 502, 44 U.S.C. § 307 [appearing in its present form at 44 U.S.C. § 1507 (1976)]." 332 U.S. at 384-5.

The SBA Administrator had published in the Federal Register a delegation of authority explicitly declaring that an employee in the position of Peninger did not have the authority to make the alleged contract.[4] Plaintiffs do not contradict the proposition that Peninger was without authority to negotiate and enter the contract on behalf of the SBA. Indeed, on their appeal they contend that Peninger "acted beyond the scope of his authority as conceded by the government . . . ."[5]

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[4] 40 Fed. Reg. 11657, 11660 (1975).

[5] See Brief for Appellants at 5.

The consequent absence of a contract under which the SBA owed any obligation to the plaintiffs disposed of any basis for complaint as to the reasonableness of the refusal by the SBA to sell to plaintiffs. We need not investigate whether, as plaintiffs assert, our statement in *Duncan v. Furrow Auction Co.*, 564 F.2d at 1107, was only a dictum which stated: "[N]othing required the Administrator to accept plaintiffs' offer to purchase the notes rather than to proceed with the foreclosure. Nothing indicates that this was unreasonable." 564 F.2d at 1109. Even if a dictum (and we are by no means convinced that the statement was not in fact a holding), the statement appears to us eminently correct and any claim on that basis against the Government must fail. Certainly the absence of any contractual obligation on the part of the Government eliminates the reason advanced by plaintiffs to show the unreasonableness of the SBA's conduct.

The statute, 15 U.S.C. § 634(b)(2), speaks only in terms of the *Administrator's* determining that terms, conditions, and consideration of any sale by him are reasonable. Assuming *arguendo* that a cause of action in damages against the Administrator (or an SBA employee in the employee's official capacity) might be inferred if terms, conditions, and consideration were unreasonable,[6] there is no language in the statute to permit inference of a cause of action against an SBA employee in his individual capacity.

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[6]A point as to which we express no opinion.

B. Inducement of Advancement, Inc.

As for the alleged contract with Advancement, there is nothing in the record which would support the conclusion that the SBA or Peninger, acting individually, sought to induce Advancement to a breach. The sole allegation of the complaint was that Peninger, acting for the SBA, "induced Advancement, Inc. to fail and refuse to perform said agreement *in that Advancement, Inc. . . . refused to accept the cashier's checks . . . and refused to assign the Promissory Note, Security Agreement and/or collateral interest owned by Advancement, Inc. to Columbus Deverlopers, Inc.*" (emphasis supplied). Such a non sequitur of purely conclusory pleading does not adequately spell out causation. Advancement could have declined to assign for a number of reasons, not the least a belief, not induced by any other party, that, in view of the SBA's position, its asserted contract with the plaintiffs was invalid. *Cf.* Restatement (Second) of Torts § 766, Comment j, para. 2 (1979).

C. The Constitutional Claim.

The claim of a constitutional violation need not detain us long. It proceeds on the theory that the order of auction (bidding for all the security in a lump sum followed instead of preceded by bidding on each individual item) caused harm to the plaintiffs. However, as plaintiffs have alleged no contract according them any right in the properties, they lack standing to make the claim. Furthermore, the allegations make it clear that either Auto Vac, Inc. or Columbus Developers, Inc., the corporation to which the security interests were allegedly to be transferred, were the owners, not the individual plaintiffs. For that second reason, the plaintiffs also

lack standing. We need not explore, therefore, the dubious proposition that every tort or breach of contract constitutes a claim of constitutional dimensions.

D. Breach of Warranty.

Plaintiffs, of course, could not sue Peninger on the asserted contract with the SBA. First, there was no such contract, for plaintiffs acknowledge that Peninger, the only party alleged to have negotiated the agreement, lacked authority to enter the contract. *See* note 5 *supra.* Second, as to a claim *on the contract,* Peninger was a fully disclosed agent, and as such was not liable. *See* Restatement (Second) of Agency § 320 & Comment a (1958).

At most, plaintiffs are in a position to assert (though it is only with great liberality in the treatment of their pleading that it is possible to proceed as though they had done so) that Peninger wrongfully warranted that he had authority to bind the SBA. *See id.* § 329 & Comment g.

However, since plaintiffs were chargeable with knowledge that Peninger had no authority to bind the SBA to a contract for a sale of the assets admittedly belonging to the Government, it is simply untenable to contend, on the basis of the pleadings in this case, that Peninger implicitly warranted his authority.[7] Hence, there was

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[7] *See* Restatement (Second) of Agency, § 331 (1958):

A person who purports to make a contract, conveyance or representation on behalf of a principal whom he has no power to bind thereby is not subject to liability to the other party thereto if he sufficiently manifests that he does not warrant his authority and makes no tortious misrepresentation.

no contract entered between the plaintiffs and the SBA, nor any representation by Peninger that, in making the alleged contract on behalf of the SBA, he had authority to do so. On that basis, there is no foundation for the fourth claim of an asserted breach of warranty. Dismissal was proper.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil No. C-C-79-0026

[Filed: Aug. 13, 1979]

W. EARL DUNCAN, *et al.*,

Plaintiffs,

v.

GLENN PENINGER,

Defendant.

ORDER

THIS CAUSE having come on upon Defendant's Motion to Dismiss or in the Alternative for Summary Judgment filed March 30, 1979; thereafter supplemented on May 21, 1979 and August 1, 1979; and

IT APPEARING TO THE COURT THAT Defendant's motion to dismiss should be granted;

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss is hereby granted for the reasons set forth by the Fourth Circuit Court of Appeals in *Duncan, et al. v. Furrow Auction Co.*, 546 F.2d 1107 (1977), and that this action be dismissed.

This 13th day of August, 1979.

/s/ James B. McMillan
United States District Judge

Supreme Court, U. S.
FILED
DEC 4 1980
MICHAEL RODAK, JR., CLERK

No. 80-459

In the Supreme Court of the United States

OCTOBER TERM, 1980

W. EARL DUNCAN, ET AL., PETITIONERS

v.

GLENN PENINGER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Cannon v. *University of Chicago*, 441 U.S. 677 4

Duncan v. *Furrow Auction Co.*, 564 F. 2d 1107, cert. denied, 436 U.S. 904 2

Touche Ross & Co. v. *Redington*, 442 U.S. 560 4

Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 4

Constitution and statutes:

United States Constitution, Fifth Amendment 3, 4

15 U.S.C. 634(b)(1) 2

15 U.S.C. 634(b)(2) 3, 4

Miscellaneous:

40 Fed Reg. 11657, 11660 (1975) 4

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners contend that the court of appeals erred in rejecting their claims for monetary relief against an employee of the Small Business Administration (SBA) who allegedly caused the breach of an oral agreement by the SBA to sell instruments of indebtedness.

1. Petitioners, owners of approximately 80% of the stock of Auto Vac Company, filed this suit in the United States District Court for the Western District of North Carolina against respondent, an SBA employee, seeking $300,000 in damages. In 1969, before petitioners became Auto Vac shareholders, the company borrowed $85,000 from a bank. The bank took a promissory note secured by Auto Vac's personal property. In addition, the president of the company and his wife guaranteed repayment of the loan and gave the bank deeds of trust on certain real property as additional security. SBA guaranteed 90% of the debt (Pet. App. 2a).

Two years after the initial loan transaction, Auto Vac defaulted, and the bank asked the SBA to purchase the guaranteed portion of the loan. The Auto Vac note and the various security agreements were assigned to the SBA (Pet. App. 2a).

The note matured in 1975. Since Auto Vac had failed to make full payment, the SBA began foreclosure proceedings to liquidate the security. Advancement, Inc., another Auto Vac creditor, also moved to liquidate the Auto Vac assets that had been pledged to secure its claim, and this foreclosure proceeding was coordinated with the SBA proceedings. Respondent was assigned to supervise the liquidation auction, scheduled for January 29, 1976. Shortly before the auction, petitioners offered to buy the Auto Vac notes and underlying security agreements from respondent, tendering checks in the amount of Auto Vac's debts to SBA and Advancement. Respondent refused the checks, although petitioners assert that he had orally assured them that he would accept the payment (Pet. App. 2a-3a).[1]

Petitioners sought to enjoin the foreclosure proceedings in state court. Upon removal to federal court, the action was dismissed pursuant to 15 U.S.C. 634(b)(1), which forbids any injunction against the SBA Administrator or his property. The court of appeals affirmed. *Duncan* v. *Furrow Auction Co.*, 564 F. 2d 1107 (4th Cir. 1977), cert. denied, 436 U.S. 904 (1978).

2. In January 1979, petitioners filed this lawsuit against respondent, seeking damages for harm allegedly suffered as a result of respondent's refusal to sell them the Auto Vac

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[1]Although the record is not clear, petitioners apparently assert that Advancement also had agreed to accept their payment in lieu of foreclosure (see Pet. App. 8a). Advancement is not, however, a party to this lawsuit (*id.* at 3a n.1).

notes and security agreements.[2] The district court dismissed the action "for the reasons set forth by the Fourth Circuit Court of Appeals in *Duncan, et al.* v. *Furrow Auction Co.*, 5[64] F. 2d 1107 (1977)" (Pet. App. 11a).

On appeal, the court of appeals liberally construed the complaint to allege four causes of action against respondent: (1) a violation of 15 U.S.C. 634(b)(2) because the refusal to sell to petitioners was unreasonable; (2) an improper inducement of Advancement to breach its contract with petitioners; (3) an improper taking of property in violation of the Fifth Amendment; and (4) a breach of warranty of authority (Pet. App. 4a). The court of appeals held that each of petitioners' claims for relief was barred.

Because the SBA had no contractual obligation to sell the notes and security agreements to petitioners, the court of appeals found that there was no basis for petitioners' claim that the action was "unreasonable" in violation of 15 U.S.C. 634(b)(2). Alternatively, the court found that Section 634(b)(2) does not create a private right of action for damages against an SBA employee (Pet. App. 6a-7a). As to the second claim, the court found that petitioners' "non sequitur of purely conclusory pleading" (*id.* at 8a) was insufficient to create a material issue of fact. Moreover, because petitioners "alleged no contract according them any right in the" Auto Vac property, the court concluded that they had no standing to assert any "taking" claim (*id.* at 8a-9a). Finally, as to the last cause of action, the court concluded that petitioners were charged with notice of respondent's lack of authority to bind the SBA (*id.* at 9a-10a). The court of appeals therefore affirmed the judgment of the district court.

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[2]Petitioners also filed suit against the United States in the Court of Claims, alleging the same harm (Pet. App. 4a).

3. The decision of the court of appeals is correct and does not conflict with the decision of any other court of appeals. Further consideration by this Court is unwarranted.

The court of appeals correctly held that 15 U.S.C. 634(b)(2) does not create a cause of action for damages against the SBA or its employees. The statute simply defines the broad discretionary powers of the Administrator: "the Administrator may * * * under regulations prescribed by him, assign or sell * * * *in his discretion* and upon such terms and conditions and for such consideration as the *Administrator shall determine to be reasonable*, any evidence of debt * * *" (emphasis added). A private right of action is not implied by this language. See, *e.g., Cannon* v. *University of Chicago*, 441 U.S. 677, 690-693 n.13 (1979). As this Court has observed, "[t]he ultimate question is one of congressional intent * * *." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979). See *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 23-24 (1979). There is no basis for concluding that Congress intended to create a private right of action in favor of prospective purchasers of assets held by the Administrator.

Petitioners apparently contend (Pet. 12-17) that respondent's failure to accept their checks pursuant to the asserted oral agreement violated the Fifth Amendment and that respondent should be liable in damages for his action. As the court of appeals correctly concluded (Pet. App. 6a, 8a-9a), however, petitioners never had any property interest in Auto Vac's property.[3] Hence, petitioners failed to state even a colorable constitutional claim.

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[3]Respondent, of course, had no power to make the agreement attributed to him by petitioners. See 40 Fed. Reg. 11657, 11660 (1975).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1980

DOJ-1980-12